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No. 93-90

In The

Supreme Court of the United States

October Term, 1993

BLAKE CONSTRUCTION COMPANY, INC.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a contract has been and can be interpreted to invoke an impossibility without providing a remedy in violation of *U.S. v. Spearin*, 248 U.S. 132 (1918) and it's progeny?

2. Whether an appelalte court can declare itself *the* "reasonably intelligent contractor" to interpret terms of art in a contract contrary to the trial court's undisturbed fact findings on such terms and as to invoke an impossibility of performance without remedy?

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OPINIONS BELOW

The opinion of the United States Claims Court finding and holding in Petitioner's favor is reported at 25 Cl.Ct. 177 (1992). (App. 1 - 25).[1]

The decision of the United States Court of Appeals for the Federal Circuit ("CAFC"), reversing without remand, is reported at 987 F.2d 743 (Fed.Cir. 1993). (App. 26 - 34).

[1] References to the Appendix to this Petition are referenced to herein as (App. ___).

STATEMENT OF JURISDICTION

The judgment of the CAFC was entered on February 23, 1993. On April 13, 1993, the CAFC filed an Order denying the Petition for Rehearing. (App. 35 - 36). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE *SPEARIN DOCTRINE* AND FEDERAL REGULATIONS.

The most important and fundamental rule of law in contracting for construction, services, etc. is the *Spearin Doctrine* or *Spearin Warranty. United States v. Spearin,* 248 U.S. 132 (1918) ("*Spearin*"). The *Spearin Doctrine* holds that the owner, i.e., Federal Government in this case, impliedly warrants the adequacy and suitability of its plans and specifications. Thus, the risk that the plans and specifications are defective, will produce an inadequate result when followed or are impossible to perform is allocated to the owner. Breach of the implied warranty entitles the contractor to damages resulting from the breach, including the cost of additional work performed by the contractor at the Government's direction to correct or compensate for the breach, defect, impossibility, etc.[2]

Based on the Defense Acquisition Regulations ("DAR") and the Federal Acquisition Regulations ("FAR"),[3] federal procurement contracts are required to

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[2] See *Spearin* at 138, DAR 7-602.3(d) and FAR 52.243-4(d).

[3] The FAR was enacted on April 1, 1984 and superseded or replaced the DAR as to all contracts entered by the Federal

contain certain clauses. Consistent with *Spearin*, the federal regulations require the contract to contain a "Changes" clause to provide a remedy in the case of defective specifications and breach of the implied warranty. See General Provision No. 3 Changes (1968 FEB) (DAR 7-602.3).[4]

The Changes clause and regulation in relevant part, states:

> (a) The Contracting Officer may . . . by written order . . . make any change in the work within the general scope of the contract, including but not limited to changes:
>
> > (i) In the specifications (including drawings and designs):
> > (ii) In the method or manner of performance of the work;
>
> (b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause . . .
>
> (d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or

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Government after April 1, 1984. For purposes of this Writ of Certiorari, the substance and wording of the applicable clauses are identical. Only the DAR versus FAR reference and regulation number was changed.

[4] The identical clause is now contained at FAR 52.243-4 (AUG 87).

> not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly. . . . And provided further, that in the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

STATEMENT OF THE CASE

A. The *Spearin Doctrine*

The origin of the *Spearin Warranty* is the Supreme Court's discussion and holding in *Spearin*. Hundreds of cases have followed *Spearin* including numerous decisions of the United States Court of Claims. For example, see *Owens-Corning Fiberglas Corporation v. United States*, 419 F.2d 439, 458 (Ct.Cl. 1969) citing *Spearin* and numerous Court of Claims precedents ("a long line of cases [hold] that the Government warrants the sufficiency of its specifications and should respond in damages or equitable adjustment should they prove to be defective or impossible to perform"); and, *Luria Brothers & Co. v. United States*, 369 F.2d 701, 702-703 (Ct.Cl. 1966) citing *Spearin* and other Court of Claims precedent ("It is well-settled that when the Government orders a structure to be built, and in so doing prepares the specifications prescribing the character, dimension and location of the construction work, it implicitly warrants that if the specifications are complied with, satisfactory performance will result.")

In *Spearin*, the Supreme Court held that the contract provisions imported an implied warranty and the Government was liable for the damages resulting from its breach. In making its decision, the Supreme Court stated:

> The general rules of law applicable to these facts are well-settled. Where one agrees to do, for a fixed sum, *a thing possible to be performed*, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. (Citations omitted). *But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.* (Citations omitted). This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work,. . . . (Emphasis added).

(*Spearin* at 136).

The first two sentences of the above quote are also the source for the "performance specification" versus "design specification" distinction. See *J.L. Simmons Company, Inc. v. United States*, 412 F.2d 1360, 1362 (Ct.Cl. 1969). By express definition, the implied warranty is breached when the contract is interpreted to invoke an impossibility, regardless of the "performance" versus "design" distinction, designation or determination. (*Spearin* at 136).

B. The Facts

1. The contract was for the construction of a hospital addition. Blake Construction Company, Inc. ("Blake") was the prime contractor. Steiny and Company, Inc. ("Steiny") was the electrical subcontractor. The electrical feeder system ("EFS") is the subject of this litigation. The project involves the construction of four buildings on a rectangular tract measuring approximately 1,200 ft. by 200 ft. A corridor ran most of the length of the four new buildings [i.e., approximately 1,200 ft.]. The corridor measures approximately 14 ft. high by 18 ft. wide, and is intended to facilitate the movement of people, supplies and utilities within the hospital addition. (App. 3 - 4).

2. For better understanding, a top and side view of the building with corridor are attached at App. 37 - 38. The location of the EFS as shown on the drawings, as planned (underground), and as directed pursuant to the "revised installation" is color coded.

3. The origin of the parties dispute is derived from interpreting certain related contract requirements concerning the EFS installation. The EFS specifications provide:[5]

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[5] For an unknown reason, the CAFC's opinion fails to mention the existence of the specifications, only mentioning the drawing notes on the drawings. The CAFC ignored the specifications and reversed the Order of Precedence clause. See DAR 7-602.2 (1964 Jun) and FAR 52.236-21 (Apr 84) ("[i]n case of difference between specifications and drawings, the specifications shall govern.")

> 1.3 General Requirements: Drawings are diagrammatic and shall not be scaled for exact locations. Field conditions and non-interference with other utilities shall determine exact locations.
>
> 3.1 Installation: Conform with the National Electric Code.

4. The original EFS drawings depict the electrical conduits located on utility racks on the west side confines of the overhead corridor. See the drawings at App. 14. Consistent with the specifications, these drawings contain a qualifying note which states:

> All feeder details & sections are diagrammatic. Contractors shall relocate any/all conduits as per existing conditions to coordinate with all other trades.

5. Initially, the Navy interpreted the drawings to be detailed "design specifications" allowing no discretion or deviation. The Navy directed Petitioner to perform in accordance with its interpretation.[6] (App. 5).

6. Petitioner responded by informing the Navy that its interpretation was impossible. (App. 5). The Navy's interpretation was impossible because: the drawings were many times incomplete, the drawings show the various utilities occupying the same space; the corridor was not

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[6] The Navy's interpretation would allow Petitioner to move an electrical conduit only two or three inches from where the Navy interpreted the contract to "precisely" show and require the conduit to be located. (App. 5).

physically large enough to fit all of the utilities within its spatial constraints regardless of the contract requirements to relocate to avoid interference; and, in the areas where the utilities could all physically fit within the corridor, major interference would result in violation of the specifications and drawing notes, the electrical codes, safety requirements and the custom and standard of the industry. (App. 5, 6, 16 - 20).

7. "The Navy continued to insist that [Petitioner's EFS] installations rest on the utility racks precisely as shown diagrammatically on the electrical drawings, and that the conduit at all times remain within the corridor." (App. 5). Pursuant to the Navy's instructions, Petitioner and others undertook an exhaustive engineering, layout and coordination effort to ascertain the physical possibility of installing the utilities in the conflicting and confined spaces as directed. (App. 5 - 6). This effort demonstrated that compliance with the Navy's interpretation and directives was impossible. (App. 5 - 6). "Thus, it would be necessary in some areas to route the conduit *outside the corridor* and in another area to forego the use of conduit at all and install bare cable on cable trays." (App. 6 and emphasis added).

8. Disbelieving this information, the Navy retained, under a new contract, the design engineers for the hospital addition, to prepare design drawings to verify Petitioner's conclusion. (App. 6). These design engineers ultimately reached the conclusion of Petitioner, i.e., the Navy's interpretation was impossible of performance. (App. 6). "In light of the A&E's conclusion, *defendant ordered Blake to proceed with the* ***revised installation,*** *which was done.*" (App. 6 and emphasis added).

9. The fact is undisputed that the actual EFS installation was based on the "revised installation" as ordered by the Navy. (App. 6). The "revised installation" introduced at trial was an approximately 6 x 2½ ft. schematic drawing which demonstrated that the Navy's interpretation was impossible and depicted an alternative to make the EFS installation fit within the corridor where physically possible. The actual, "revised installation" does not resemble the installation shown by the original EFS drawings.[7] The "revised installation" drawing completely replaced the original EFS drawings, which were wholly disregarded and impossible to perform. (App. 5 - 6 and 19 - 20).

10. Based on the "revised installation" and the Government's order, the Petitioner installed most of the EFS within the overhead confines of the corridor near the corridor's east wall.[8] (App. 6). "In some places it was

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[7] For example, the "revised installation" required: the EFS to be located along the east wall instead of the west wall (near the substations); the EFS to leave the corridor confines; the implementation of bare cable on cable tray; and, the EFS to be "intricately woven" or snaked through and around other utilities as opposed to being placed in fairly straight runs as depicted by the original EFS drawings. (App. 5 - 6, 18 and 28).

[8] The original electrical drawings (which were disregarded) depicted the EFS being installed along the corridors west wall. The substations which the EFS is running between and connecting were behind the west wall, over 18 ft. away from the east wall. Other, amended contract drawings required the mechanical system to occupy the area along the west wall making installation of the EFS in that area impossible. Two physical properties or materials cannot occupy the same space. Thus, between the EFS along the east wall and the substations behind the west wall were the mechanical and plumbing utility installations, e.g., heating, ventilating and air conditioning ducts, and plumbing lines for hot and cold water, steam and gases. (App. 5 - 6, 12, 19, 20 and 28).

necessary to intricately weave the conduit around mechanical conduits or pipes in order to remain within the confines of the corridor." (App. 6). In another area, to make the EFS installation possible of fitting within the corridor, the Government directed the installation of bare cable (without conduit encasement) on cable trays. This installation violates the specifications and the National Electric Code. The plans and specifications neither address nor mention such an installation. (App. 6, 16, 18).

11. After substituting the "revised installation" for the original EFS drawing, the fact is undisputed that the EFS could not be installed within the corridor confines in two areas because installation was impossible due to insufficient space. (App. 6). In one area, Petitioner was required to route EFS conduits outside the corridor and around the elevators due to insufficient space. In another area between the central plant and warehouse, Petitioner was required to route the EFS conduits outside and above the corridor through the air handling equipment room. (App. 6).

12. The objective of the "revised installation" was to make the EFS installation fit within the overhead confines of the corridor wherever physically possible. (App. 5 - 6). The "revised installation" and its objective disregarded the contractual requirement to relocate the EFS installation to avoid interference and conflict with other utilities and trades. Consequently, the actual, "revised installation" resulted in a condition of "major interference" existing between and among the EFS and other utility installations. (App. 19 - 20). As will be demonstrated, the Claims Court factually found "major interference" resulted and that the requirement to relocate to avoid

interference was impossible or not "feasible" within the spatial constraints of the corridor.[9] (App. 19 - 20).

C. Prior Proceedings

1. Uncontested Factual Findings of the Claims Court[10]

The Claims Court factually found that the actual installation performed in accordance with the "revised installation" as directed by the Navy constituted *"major interference."* The Claims Court finds:

> As the parties acknowledge, the feeder system was extremely complicated, consisting of hundreds of wires and other electrical materials. As such, the feeder system created a crowding problem when placed overhead. *The evidence again showed* that it was not only wise to put the system in an underground duct bank below the corridor surface, safe from harm's way, it was also *the only feasible solution available* to Steiny

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[9] The bottom line is that the area overhead within the corridor was too small to house the utilities without creating major interference between them. As interpreted by the Government and the CAFC, the contract contains two competing requirements which cannot co-exist because of insufficient space. The only possible way the Petitioner could install the EFS in a location to avoid interference was to install the EFS outside the confines of the corridor. If the EFS is installed within the corridor, then an installation which avoided interference was impossible and "major interference" results. (App. 5 - 6, 19 - 20, 28 and 33).

[10] The United States Claims Court possessed jurisdiction based on the Contract Disputes Act, 41 U.S.C. § 609(a)(1) and the Tucker Act, 28 U.S.C. § 1491(a)(2). The CAFC possessed jurisdiction on appeal pursuant to 28 U.S.C. § 1295(a)(3).

> *given the spatial constraints of the corridor.* It was clear on the court's visit that *there was major interference between the electrical feeder system and the other trade materials in the hospital corridor.* (Emphasis added).

(App. 19 - 20).

The fact is undisputed and uncontested that the requirement to relocate to avoid interference was impossible (or not "feasible") within the spatial constraints of the corridor. (App. 19 - 20). The CAFC's interpretation disregards this uncontested fact, i.e., the two requirements cannot co-exist because there was insufficient space. "Feasible" is defined: "capable of being done or carried out" . . . "**syn** see POSSIBLE." *Webster's New Collegiate Dictionary,* p. 419 (1977).

Further factual findings by the Claims Court demonstrating the physical impossibility of installing the EFS within the corridor without major interference and the "major interference" which resulted from the Navy's directive are as follows:

> (a) [Petitioner] undertook an exhaustive . . . effort to ascertain the physical possibility of installing the plumbing and electrical utilities in the conflicting and confined spaces directed. As a result of this effort, it was determined that complete compliance with Defendant's directives was impossible;
>
> (b) [Petitioner] had installed most of the [EFS] within the confines of the corridor on brackets attached to the ceiling near the corridor's east wall . . . In some places it was necessary to

> intricately weave the conduit around mechanical conduits or pipes in order to remain within the confines of the corridor;
>
> (c) The court has heard argument on whether the specifications governing the [EFS] were of a design or performance nature, and on the meaning of the phrase "diagrammatic" on the contract drawings. The court visited the site and observed the installation as it ultimately was constructed. The court, with the assistance of counsel and the witnesses presented, has studied the drawings and specifications governing this project;
>
> (d) On its site visit of the hospital, the court observed the morass of wires and conduits which adorned the ceiling of the corridor;[11] and,
>
> (e) The conduits which enclosed the electrical system were in many places packed closely to steam and water pipes, which posed significant problems for future maintenance or expansion.

(App. 5, 6, 7, 16, and 19, respectively).

Based on the evidence, the preceding factual findings and the parties positions, the Claims Court determined that the specifications, notes and drawings concerning the EFS combined to mandate a performance obligation to relocate the EFS to avoid interference and conflict with other trades and utilities. (App. 10 - 15). By definition, the performance obligation was complete and unfettered (other than reasonableness under the circumstances). (App. 11 - 12 and 29 - 30). Pragmatically, Petitioner's

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[11] See the sample photographs produced in the Claims Court's opinion at App. 17 - 18.

performance obligation was not and could not possibly be physically limited to the confines of the corridor because such an interpretation would render the performance obligation impossible to obtain due to spatial constraints of the corridor.[12] (App. 19 - 20).

In summary, the Navy's initial direction concerning placement of the EFS was undisputedly proven and found impossible. (App. 5 - 6). Thus, the Navy relaxed its interpretation to require the EFS be installed anywhere within the overhead corridor confines, unless physically impossible, which resulted in the "revised installation" drawing. (App. 5 - 6). The Claims Court held that the Navy's directive to follow the "revised installation" though it resulted in major interference constituted a change to the contract which entitled Petitioner to an equitable adjustment. (App. 10 and 24). In effect, the Navy's interpretation and directive rendered the requirement to avoid interference and conflict impossible of attainment, which would entitle Petitioner to an equitable adjustment under both the implied warranty and constructive change theories regardless whether defined as a performance or design specification.

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[12] If the performance obligation is not "a thing possible to be performed," then the implied warranty is breached. *Spearin* at 136. In addition, the *contra preferentum* rule prevails *a fortiori* where the drafting parties interpretation is wholly unreasonable, because it seeks to invoke an impossibility. *Owens-Corning Fiberglas Corp.* at 459.

2. The CAFC Opinion

The CAFC Opinion identifies two contract requirements. The contract required the avoidance of interference and conflict. Additionally, the contract required installation of the conduits overhead within the confines of the corridor. The CAFC states:

> We believe that a reasonable contractor would understand that the contract required more than mere avoidance of conflict with the other trades. The specifications, viewed as a whole, additionally required installation of the conduits overhead within the confines of the corridor.

(App. 33).

Concerning the two areas where the EFS absolutely had to be placed outside the corridor because of insufficient space, the CAFC Opinion recognized these areas as *"both changes!"* (App. 28 and emphasis added). However, the CAFC simply reversed the Claims Court without providing any remedy for these recognized "changes" to the contract. Two uncontested facts concerning the installation of the EFS must be stressed: (1) the Navy never issued a modification; and (2) the Navy has never made any additional payment.[13]

The CAFC states that whether the specifications are classified as "performance" or "design" is immaterial.

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[13] The CAFC states that "both changes were approved by the Navy." (App. 28). The Claims Court factually found that "Defendant ordered Blake to proceed with the revised installation, which was done." (App. 6). Evidently, the CAFC interprets a "directive" as "approval" of a change though neither a payment or remedy has been provided.

(App. 31). Rather, the CAFC describes the "real issue" as "*how much discretion* the specifications gave Blake in the placement of the electrical feeder system." (App. 32 and emphasis added). The CAFC then construed a limitation on the exercise of such discretion by a reference to the electrical drawing details which depict or describe the *unrelocated* placement of the EFS, i.e, the desired location if such could be attained without interference and conflict. (App. 33). The facts are undisputed that this location on the west side of the overhead corridor was occupied by the mechanical installation and that two physical properties or materials cannot share the same space. (App. 5 - 6). The preceding facts are one reason the original electrical drawings were scrapped and the Navy ordered Petitioner to install in accordance with the "revised installation" drawings. (App. 5 - 6).

The CAFC stated that "we do not revisit the Claims Court's fact findings to reach our conclusions." (App. 33). On appeal, none of the factual findings were challenged by Defendant. Though not specifically acknowledged, the CAFC necessarily determined and overturned several factual findings without concluding the same were capricious, arbitrary or not based on substantial evidence.

The CAFC recognized that the contract is to be interpreted and given the meaning "imputed to a reasonably intelligent contractor acquainted with the involved circumstances." (App. 32 - 33). Without reference to the evidence of the Claims Court's factual findings, the CAFC made itself *the* "reasonable contractor." (App. 33). The CAFC concluded that the "only reasonable" interpretation of the specifications on the relocation of the EFS

is that it be installed overhead within the confines of the corridor. (App. 33).

To the contrary, the Claims Court factually found that "[t]he evidence again showed that it was not only wise to put the system in an underground ductbank below the corridor surface, safe from harms way, it was also the only feasible solution available to Steiny given the spatial constraints of the corridor. It was also clear on the Court's visit that there was major interference between the electrical feeder system and the other trade materials in the hospital corridor." (App. 20). How can something which the Claims Court factually finds to be impossible or not feasible be determined by the CAFC to be reasonable?

REASONS FOR GRANTING THE WRIT

1. The CAFC Has Violated And Gutted The Spearin Warranty By Interpreting The Contract To Invoke An Impossibility Without Providing A Remedy.

The law is well-established that the Government warrants the accuracy and suitably of its plans and specifications. A contractor is entitled to an equitable adjustment and remedy should they prove to be defective or impossible to perform. This is true regardless of whether labeled "design" or "performance." See *United States v. Spearin*, 248 U.S. 132 (1918), DAR 7-602-3(d), FAR 52.243(d) and *Owens-Corning Fiberglas Corp. v. United States*, 419 F.2d 439, 458 - 459 (Ct.Cl. 1969).

Contrary to the holding in *Spearin*, the CAFC's decision has shifted the burden of impossible or defective specifications to the contractor. In addition, the CAFC's holding has required the Petitioner to perform government directed

changes to the contract work without a remedy in violation of *Spearin* and the federal regulations. To simply reverse without remand violates and effectively overrules *Spearin* and its progeny. The CAFC has violated and disregarded numerous Court of Claims cases which are binding precedent and can only be overruled by the Federal Circuit sitting *en banc*. See *Southcorp v. United States*, 690 F.2d 1368 (Fed. Cir. 1982). Moreover, the CAFC has violated its own precedent and the required procedure to follow when it acts in disregard and contravention of the Court of Claims decisions.

The Department of Defense procurement actions, alone,[14] during fiscal year 1992 totaled $136,296,711,000., which is the lowest in ten years. See *DOD Prime Contract Awards FY 1992*, 59 Federal Contracts Report, 269, 291 (March 8, 1993).[15] By virtue of the Supreme Court's decision in *Spearin*, its progeny and the federal regulations, generally every federal contract carries the implied *Spearin Warranty* and accompanying remedy for breach. In addition, the *Spearin Warranty* governs every construction contract entered by other owners such as states, counties, cities, municipalities, private concerns, etc.

In accordance with the policy and law determined by *Spearin* and its progeny, a contractor must be able to rely that

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[14] These actions do not include other federal agencies which contract such as the Departments of: Agriculture, Energy, Health and Human Services, Interior, Transportation, Veterans Affairs, etc.

[15] Petitioner's case involves a damage award of 1.68 million plus interest totaling over 3 million dollars. (App. 23 - 24). The amount of damages was unchallenged on appeal. (App. 26 - 34).

the plans and specifications are accurate so that when followed a suitable and intended result or product will be attained. The *Spearin Warranty* accomplishes this policy objective by allocating the risk for inaccurate, unsuitable, defective or impossible plans and specifications to the owner and not the contractor. The preceding risk allocation provides an imperative element of certainty and uniformity to foster fair, competitive, open market bidding practices between and among contractors. As a result, the owner or government obtains the desired quality and product or service at the best available price.

The CAFC has committed gross error by interpreting the contract to invoke an impossibility without providing a remedy. The CAFC has concluded as a matter of law that the contract required the installation of the EFS in such a manner as (1) to avoid interference with other trades but (2) to remain within the confines of the corridor. (App. 33).[16] The CAFC holds that this is the only reasonable interpretation of the contract. (App. 33).

However, the CAFC's unrealistic conclusion raises the pivotal issue of how can an interpretation or performance which the Claims Court factually finds to be impossible or not feasible be determined by the CAFC to be the only reasonable one? The answer is that the CAFC interpreted the contract in a vacuum with total disregard or ignorance of

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[16] See App. 33 "[w]e believe that a reasonable contractor would understand that the contract required more than mere avoidance of conflict with other trades. The specifications, viewed as a whole, additionally required installation of the conduits overhead within the confines of the corridor."

reality, the root problem and the evidence and factual findings concerning spatial conflicts and constraints, which caused this dispute in the first place.

Regardless of the first requirement to relocate to avoid interference, solely fulfilling the second requirement to relocate within the confines of the corridor was itself impossible. The finding that Petitioner left the corridor confines was recognized by the CAFC as "both changes"![17] (App. 28). The *Spearin Warranty* and the changes clause mandate a remedy or equitable adjustment. In stark conflict with the binding federal authority, the CAFC has inexplicably failed to award the mandatory remedy for its own recognized "both changes."

In derogation of reality, feasibility and the Claims Court's factual findings, the CAFC interpreted the contract to contain two competing requirements which cannot coexist because of insufficient space. (App. 5 - 6, 19 - 20 and 33). This preceding factual impossibility is and has always been the root of the dispute, i.e., implementing one of the requirements precludes achieving the other. If both requirements could have been attained, there would never have been a dispute in the first place. Thus, the CAFC's misinterpretation has, in effect, brought the parties dispute full

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[17] Undisputably, the CAFC stated that the relocation of the EFS outside the corridor were "both changes." Again, two uncontested facts concerning the installation of the EFS must be stressed: (1) the Navy never issued a modification; and (2) the Navy has never made any additional payment. The CAFC is expressly recognizing a change but refusing compensation. The pure reversal is an obvious violation of *Spearin* and the federal regulations.

circle to the initial impossibility and problem which arose almost 10 years ago.

The CAFC has somehow wholly ignored the uncontested factual finding that the installation depicted in the original EFS drawings was undisputedly impossible and completely disregarded, which is a breach of the implied warranty. *Spearin*. (App. 5 - 6). After great effort, the Navy finally accepted this fact which resulted in the Navy relaxing its interpretation as to the location of the EFS. Because of this impossibility, the Navy ordered Petitioner to comply with the "revised installation" drawings (*not* the original EFS drawing bid on), which was done. (App. 5 - 6). *The directive and resulting performance based on the revised installation due to the defective and impossible original EFS drawings is a change.* DAR 7-602.3 and FAR 52.243-4. A remedy is mandated by *Spearin* and these federal regulations.

In consequence of the conflict caused by the drawings requiring separate utilities to occupy the same space, the electrical drawings, notes and specifications mandated the relocation of the EFS to avoid conflict and interference with the mechanical installations and other trades. (App. 14 - 16 and 33). Other than reasonableness under the circumstances, the contract contains no spatial, dimensional or graphic direction or limitation on the extent of relocation other than that it occur to a place that would avoid interference or conflict with other utilities and trades. (App. 11 and 15; Joint Stipulation at ¶ 18). Nevertheless, the Court has *read into the contract* a limitation of relocation to an undefined place within the overhead confines of the corridor. (App. 33). By construing the existence of such a limitation into the contract requirements, *Petitioner was required to perform the impossible* inasmuch as the Claims Court's undisturbed factual findings

are that installation of the EFS was impossible within the confines of the corridor throughout its length and the installation that was accomplished within the confines of the corridor occurred and resulted in a condition of "major interference", violating the requirement to avoid interference. (App. at 5 - 6, 15 - 16, and 19 - 20).[18]

The CAFC has ignored the true, central issue of whether a breach of the implied *Spearin Warranty* has occurred. Rather, the CAFC's short sighted opinion only addressed the subsidiary "performance" versus "design" issue. The sole purpose and function of the "performance" versus "design" distinction is to determine the extent of the implied *Spearin Warranty* with risk allocation and whether there has been a breach. (App. 10 - 15 and 29 - 30 citing *Spearin, J.L. Simmons Co.* and *Stuyvesant Dredging Co. v. United States,* 11 Cl. Ct. 853, aff'd 834 F.2d 1576 (Fed. Cir. 1987)). In Petitioner's case, the CAFC Opinion has failed to comprehend and complete the core legal analysis and determination, i.e. whether there has been a breach of the implied *Spearin Warranty*? In effect, the CAFC has either sat down before crossing the finish line or wandered off course and out of bounds.

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[18] The CAFC acknowledged this fact by observing that "Steiny generally had to weave the conduits between and around the other utilities in the corridor" (App. 28).

a. By Illogically Begging The Question, The CAFC Has Obviated The "Performance" Versus "Design" Distinction And Failed To Address The Central Issue Of The Implied *Spearin Warranty.*

The CAFC's holding drastically departs from the reasoning in *Spearin, J.L. Simmons, Owens-Corning* and *Stuyvesant* mandating the classification of contract requirements as "performance" or "design" as a subsidiary issue to determining the application and potential breach of the implied *Spearin Warranty.* The logic and purpose of determining the subsidiary issue is to ascertain the extent of the *Spearin Warranty* and the corresponding risk allocation, which materially differs between performance and design specifications.[19] The danger and catastrophic effect of obviating the

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[19] The key element of distinction between "performance" and "design" specifications is contractor discretion. The critical effect of the distinction is risk allocation. By definition, a "design" specification allows or requires no discretion. Rather, a contractor follows the contract like a road map to arrive at the desired end result. The implied *Spearin Warranty* always fully applies and provides a remedy in case the specification is defective, i.e., it does not arrive at the intended, suitable result. The risk that the means will obtain the desired end result is fully allocated to the owner or Government.

On the other hand, a performance specification requires an end result and leaves the means of obtaining such result to the full discretion and ingenuity, within reason, of the contractor. The risk that the means will obtain the end result is allocated to the contractor as part of the basis of the bargain. However, the owner impliedly warrants that the end result bargained for is possible and reasonably practicable of attainment, i.e., the end result is "a thing possible to be performed." *Spearin* at 136. Also see *Owens-Corning* at 458 - 459. (App. 11 - 12, 15 and 29 - 30 citing *J.L. Simmons, Stuyvesant* and *Spearin*).

"performance" versus "design" distinction is the creation of debilitating uncertainty in the contracting profession and the bidding process concerning risk allocation.

Contractors will not be able to determine with a reasonable degree of certainty whether the plans and specifications provide an accurate and suitable means to obtaining the intended result. Rather, every aspect of the contract becomes a subjective matter of degree. Like investments, this infusion of uncertainty and accompanying risk will increase the cost of doing business to the contractor. The role and function of a contractor will be expanded to include more aspects of the designer, architect-engineer, lawyer, gambler and fortune-teller, which will result in increased disputes and litigation with accompanying costs to the parties, the courts and the taxpayer. In contracting, a direct relationship exists between perceived risk and cost, i.e., the greater the risk the greater the cost. The result will be increased costs to the Government or owner, which is contrary to the policies established by the Supreme Court, Congress and the implementing federal regulations.

Although the CAFC's Opinion erroneously indicates that whether the specifications are classified as "performance" or "design" is immaterial, it nevertheless describes the "real issue" as *"how much discretion* the specifications gave Blake in the placement of the electrical feeder system" (App 30 - 32). By begging the question and framing the issue as a matter of "how much discretion the specifications gave Blake," the CAFC acknowledged the correctness of the Claims Court's conclusion that the specification in issue is by definition a "performance" specification. This is because if the specification was a "design" specification, i.e, one requiring and allowing no discretion by definition, the issue of

discretion would be irrelevant as Petitioner would have been required to follow the specifications to the letter.

Having concluded that the *"real issue"* in the case was the *amount of discretion* (as distinguished from *no* discretion at all), the CAFC then erroneously construed a limitation on the exercise of such discretion by reference to drawing details describing the *unrelocated* placement of the EFS. (App. 33). The imposition of such a construed limitation on the performance discretion of a contractor under a "performance" specification violates and destroys established and binding precedent. See *Stuyvesant* at 1582 citing *J.L. Simmons* (*"Design specifications* explicitly state how the contract is to be performed and *permit no deviations*. Performance specifications, *on the other hand*, specify the results to be obtained, and *leave it to the contractor* to determine how to achieve those results.") and ("Stuyvesant had *complete discretion* to determine how it would perform that work. Its *only obligation* was to accomplish the designated result."). (Emphasis added).

The correct analysis, on determination that "discretion" in the performance of a contractual obligation exists requires an evaluation of whether the selected method of performance was reasonable. (App. 15 - 16). Such a determination cannot be made in disregard of the facts established at trial. Given those facts, the CAFC as an appellate court must either overturn the factual findings or accept as established that Petitioner's exercise of discretion to install the EFS in an underground ductbank, based on the evidence, was "the only feasible solution available . . . given the spatial constraints of the corridor." (App. at 20). Accordingly, for the CAFC to have concluded that *relocation* of the EFS to the *only feasible place* under the circumstances was an *abuse of discretion* by Petitioner is gross error and nonsensical.

2. The CAFC Self-Appointed Itself The Omnipotent Reasonably Intelligent Contractor And Completely Disregarded The Evidence, The Factual Findings Of The Claims Court And The Role Of An Appellate Court In Arriving At An Impossible And Unfeasible Result Or Interpretation.

The CAFC recognized that the contract is to be interpreted and given the meaning "imputed to a reasonably intelligent contractor acquainted with the involved circumstances." (App. 32). The law is established that to the extent interpretation of a contract requires the determination of the meaning of words contained therein, such a determination is a *question of fact* not of law. "'The question of interpretation of language and conduct – the question of what is the meaning that should be given by a Court to the words of a contract, is a question of fact, not a question of law'". *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988).[20]

The words "diagrammatic," "relocate," "noninterference," "coordinate," "field conditions," "existing conditions," and "other trades" are all relevant terms and phrases in the contract that are not defined within it and, by their nature and usage, are such that can only be given meaning upon consideration of custom and practice of the industry involved. By definition, evidence of meaning and trade custom is mandated to determine "the meaning imputed to a reasonably intelligent contractor *acquainted with the involved circumstances.*" See *Owens-Corning* at 459; *Gholson, Byers &*

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[20] The Federal Circuit cites and follows *S. Williston*, A Treatise on The Law of Contracts, § 616 at 649, 652 (3rd ed. 1961) and *accord* A. Corbin, Corbin on Contracts, § 554 (1960) and § 554C (Supp. 1982).

Holmes Const. Co. v. United States, 351 F.2d 987, 999 (Ct.Cl. 1965); *Everett Plywood Corp. v. United States*, 512 F.2d 1082, 1089 (Ct.Cl. 1975).

Accordingly, the Claims Court heard evidence on the meaning of the mentioned terms and concluded, *as a matter of fact*, that when these terms are read together, in light of trade usage and custom and practice "the method of installation of the electrical feeder systems was governed by performance specifications." (App. 15). Further, the Court factually found "major interference" and that installation within the corridor was not "feasible." (App. at 15 - 20).

In contrast, the CAFC has *disregarded* findings of fact on the meaning of the terms of art in question and instead created its own baseless interpretation of such words; in particular, while acknowledging that the term "diagrammatic is not defined by the contract" (App. 29) the CAFC nevertheless erroneously concludes that "the meaning of the diagrammatic notes is a matter of law" (App. 33). The CAFC construed the "diagrammatic notes" as imposing a limitation on relocation nowhere contained on the drawings, the specifications, the drawing notes or by interpretation of the meaning of the terms of art above listed[21] and interpreted the

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[21] In addition, in contravention and violation of Claims Court's factual findings based on the undisputed evidence of witnesses from both parties, the CAFC's Opinion misapprehends and implies that "interference" and "conflict" does not occur, is avoided or alleviated when the utility installations are not sharing the same space. (App. 28 and 30). Though the "revised installation" made it possible for the majority of the EFS to fit within the corridor, this created (not alleviated) the interference! The CAFC has misapprehended this factual finding, concept and meaning.

contract to invoke an impossibility. (App. 33). The foregoing was manifest error.

The CAFC either ignored or *sub silencio* reversed the Claims Court's factual findings of impossibility of performance without concluding the same were cleary erroneous, arbitrary or not based on substantial evidence. By concluding that the "only reasonable" interpretation of the specifications on the relocation of the EFS is that it be installed overhead within the confines of the corridor, the CAFC necessarily found *sub silencio* that such an installation was possible. See *Owens-Corning* at p. 459. Contrary to the CAFC's opinion,[22] such a conclusion, however, to be supportable, must have overturned the undisturbed findings of fact of the Claims Court concerning impossibility and feasibility. (App. 5 - 6 and 19 - 20). Fed.R.Civ.P. 52(a). Having failed to do so, the Court's interpretation accordingly must also fail.

The CAFC either ignored or *sub silencio* reversed the Claims Court's factual findings that Plaintiff's intended exercise of discretion on relocation of the EFS was the only feasible solution without finding that such was capricious, arbitrary or clearly erroneous. The CAFC's opinion concludes that the Claims Court "defined too broadly the amount of discretion permitted under the contract" (App. 32). In order to conclude that the Claims Court (and Petitioner) defined the limits of the contractor's discretion "too broadly", the CAFC acknowledged that it necessarily must

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[22] " . . . we do not revisit the Claims Court's fact findings to reach our conclusions" (App. 33).

place itself in the shoes of a "reasonably intelligent contractor acquainted with the involved circumstances" (App. 32).

In order to determine what a "reasonable contractor" would do upon becoming acquainted with the "involved circumstances," it is necessary to ascertain what was *feasible* under the circumstances. This is and has always been a *factual* issue which was resolved by the Claims Court conclusion that the "only feasible solution available" to Petitioner was the installation of the EFS in an underground ductbank. (App. at 20). For this Court to have concluded otherwise without overturning the Claims Court's factual findings, violates Fed.R.Civ.P. 52(a) and must be corrected.

CONCLUSION

Based on the preceding, Petition respectfully requests the Supreme Court exercise its discretion in granting the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: July 12, 1993

IN THE UNITED STATES CLAIMS COURT

No. 556-85C

Filed: January 27, 1992

BLAKE CONSTRUCTION COMPANY, INC., *Plaintiff,* v. THE UNITED STATES, *Defendant.*	Contracts; Claim Certification; Performance Specifications; Constructive Changes;

Richard D. Corona, San Diego, California, for plaintiff.

C. William Lengacher, Washington, D.C., with whom where *Thomas W. Petersen,* Assistant Director, *David M. Cohen,* Director, Commercial Litigation Branch, and *Stuart M. Gerson,* Assistant Attorney General, Civil Division, for defendant. *Frank Kitarski,* Department of the Navy, San Diego, of counsel.

OPINION

SMITH, Chief Judge.

This case involves a claim arising out of a subcontract to a fixed-price contract between Blake Construction Company, Inc. (Blake) and the United States Department of the Navy, Naval Facility Engineering Command, for the construction of a hospital addition to the Naval Regional Medical Center in San Diego, California. The

claim is brought under the contract's disputes clause by the prime contractor on behalf of the electrical subcontractor. The contract has been performed, the project has been completed, and plaintiff now seeks an equitable adjustment on its claim under the contract's changes clause, following a denial by the contracting officer (CO). Since the trial, the government has filed a motion to dismiss, claiming that the plaintiff did not submit its claim to the CO, as 41 U.S.C. § 605(a) (1988) requires.

In light of the evidence presented at trial, and in consideration of the parties' stipulations and post-trial submissions, the court finds that plaintiff is entitled to recover on its entire claim under the Contract Disputes Act of 1978 (now codified at 41 U.S.C. §§ 601-611 (1988)). The court further denies the government's motion to dismiss and plaintiff's motion for sanctions relating to the government's motion. Sanctions are not warranted in this case.

FACTS

On June 15, 1983, Blake Construction Company, Inc. (Blake), as prime contractor, entered into a $98.4 million contract with the Navy. In furtherance of its contract with the Navy, Blake entered into a subcontract on July 25, 1983 with Steiny and Company, Inc. (Steiny)[1] to perform all electrical work on the addition for a total contract price of $10.2 million. Part of the electrical work involved the installation of an electrical feeder system, the subject

[1] Blake brings this claim on behalf of Steiny, the real party in interest in this action.

of this litigation. An electrical feeder system is made up of the main power lines which distribute electrical energy to the hospital via a network of ever smaller lines that spread like tree branches through the hospital complex. In a large complex like this one there are also transformer units that reduce the high voltage lines coming into the hospital into various lower voltage ones for the ultimate hospital uses.

The design and contract drawings and the specifications for the hospital addition were prepared by a joint venture architect and engineering firm (A&E firm) hired by defendant. The joint venture consisted of Welton Becket & Associates, Hugh Gibbs & Donald Gibbs Architects, A.I.A., and Syska & Hennessy, Inc. The A&E firm produced thirteen books containing many hundreds of contract drawings and three volumes of contract specifications, all of which were provided to contractors interested in bidding on the construction project.

The project involved the construction of four buildings on a rectangular tract measuring approximately 1,200 feet by 200 feet. All floors of these buildings, including the ground floors, were to be built above grade. The four structures are:

(1) the central plant, which serves as the medical center's heat and power station and contains heavy equipment and machinery to provide mechanical and utility services such as steam, heat, power, air and water;

(2) the warehouse, a one-story structure with fourteen foot high ceilings, where the medical center's supplies are located;

(3) the auxiliary building, the largest of the four structures, which contains up to six levels of administrative offices, waiting rooms, examination rooms, doctor offices, operating rooms, a pharmacy, laboratories, a cafeteria, record storage, and kitchen and laundry facilities; and

(4) the nursing tower, a six-story building consisting of hospital rooms surrounding a core containing patient monitoring equipment.

Incorporated into the A&E firm's design was a material and personnel corridor which runs most of the length of the ground floors of the four new buildings and connects the central plant at the southern end of the project to the nursing tower at the northern end as well as to the structures between. The corridor measures approximately 14 feet high by 18 feet wide, and is intended to facilitate the movement of people, supplies, and utilities within the hospital addition. Defendant represents that the corridor also is intended to house the electrical feeder system, a contention plaintiff disputes.

On or about December 13, 1983, Steiny excavated a trench eight feet deep near the path of the planned corridor, and began to install the electrical feeder in polyvinyl chloride (PVC) conduit in an underground concrete encased duct bank. When Navy personnel questioned Steiny about the trench and use of PVC conduit on December 13, 1983, Steiny's representative replied that it was installing the feeder system underground to avoid interference with other trades, as required by the contract. Because it believed the contract permitted this work, Steiny had not requested a change order or other authorization from the Navy. Two days later, the Navy

gave written notice to Steiny that the Navy did not consider an underground installation to be included in the contract, and directed that the duct bank be removed and the feeder system be installed within the confines of the corridor.

Blake gave timely notice to the Navy that it considered the Navy's directive of December 15, 1983 to be a constructive change, and requested additional compensation. The Navy rejected this request. Steiny removed the underground duct bank under protest.

Thereafter, Steiny was directed by the Navy through Blake to install its conduit system precisely at the locations shown diagrammatically on the electrical drawings. On January 13, 1984, the mechanical subcontractor advised plaintiff that such an installation, however, required Steiny to install its conduits at the exact same location on the west side of the corridor where the amended mechanical drawings showed the installation of plumbing lines. This situation would prevail for 300 to 400 feet. Blake notified the Navy of this conflict, and was advised that it was the prime contractor's responsibility to coordinate and resolve subcontractor problems of this nature. The Navy continued to insist that Steiny's installations rest on the utility racks precisely as shown diagrammatically on the electrical drawings, and that the conduits at all times remain within the corridor.

Pursuant to these instructions, Blake, Steiny, and the mechanical subcontractor undertook an exhaustive engineering, layout, and coordination effort to ascertain the physical possibility of installing the plumbing and electrical utilities in the conflicting and confined spaces

directed. As a result of this effort, it was determined that complete compliance with defendant's directives was impossible. Thus, it would be necessary in some areas to route the conduit outside the corridor and in another area to forego the use of conduit at all and install bare cable on cable trays. This was not an ideal solution. Presented with this information, the Navy retained, under a new contract, the design engineers for the hospital addition, to prepare design drawings to verify Blake's and Steiny's conclusion. The result of the A&E's study was that the electrical conduit system could not be installed completely in the manner and locations shown on the electrical drawings. In light of the A&E's conclusion, defendant ordered Blake to proceed with the revised installation, which was done.

At the conclusion of its work, Steiny had installed most of the electrical feeder system within the confines of the corridor on brackets attached to the ceiling near the corridor's east wall. The conduit was placed either exposed (in the warehouse) or concealed above a drop ceiling (in the run through the auxiliary building to the nursing tower). In some places it was necessary to intricately weave the conduit around mechanical conduits or pipes in order to remain within the confines of the corridor. In a roughly thirty foot section near one of the substations and a segment in the boiler room the routing resulted in the conduit being outside the corridor.

On October 12, 1984 Blake certified and submitted a claim on behalf of Steiny to the CO, in accordance with the Contract Disputes Act, and pursuant to the disputes clause of the contract. The amount claimed, $3,493,967.00, was based on a forward-priced estimate of the direct,

indirect, and consequential costs and damages expected to be incurred. After the disputed work was performed, and by letter dated January 4, 1988, Blake submitted to Captain William J. O'Donnell, the Officer in Charge of Construction (OICC), a revised computation of its extra costs incurred in the sum of $1,136,089.00. That revised calculation was submitted by Blake to the CO by letter dated March 8, 1988.

DISCUSSION

The court has heard argument on whether the specifications governing the electrical feeder system were of a design or performance nature, and on the meaning of the phrase "diagrammatic" on the contract drawings. The court visited the site and observed the installation as it ultimately was constructed. The court, with the assistance of counsel and the witnesses presented, has studied the drawings and specifications governing this project. After carefully considering all of the material offered in this case, the court is convinced that this dispute arises not out of any genuine factual difference between plaintiff and the Department of the Navy, but out of the unwillingness of the Navy to reconsider a hastily-made decision, and the subsequent efforts to substantiate an arbitrary order.

At the outset, the court notes that Captain William J. O'Donnell, who made the decision and gave the order, was responsible for completing a large and generally very successful project on time and within budget, and for that he must be commended. In light of the magnitude of the overall project, it is a credit to Captain O'Donnell, his

leadership, and his staff that relatively few disputes developed. Nevertheless, there is no doubt that Captain O'Donnell's decision to order Steiny to cease its construction of the underground duct bank and to install the feeder system overhead was arbitrary, made, as he admits, without first discussing the issue with the contractor, the subcontractor, and A&E firm, or his own staff. In the court's view, it also cannot be supported as a correct or even a reasonable interpretation of the contract.

It is clear to the court that the issue which created this case was not one of the efficacy of Steiny in dealing with and performing its contractual duties. These duties were fulfilled very competently. Captain O'Donnell's own testimony attests to the fact that it was a "good job . . . [completed] a little ahead of schedule." When he informs the court that we are here on the basis of a unilateral decision made without benefit of consultation which he will never reconsider "till the day [he dies]," the true nature of this case is clear.

I. Motion to Dismiss

Approximately six months after trial, the government filed a motion to dismiss, claiming that plaintiff had not submitted its certified claim to the contracting officer. Plaintiff had submitted its claim to the OICC, Captain O'Donnell, and not the Commander, Naval Facilities Engineering Command, as the government contends it should have done. In support of its contention, the government cites *West Coast General Corp. v. United States*, 19 Cl. Ct. 98 (1989), for the proposition that the contractor

cannot submit its claim to the Officer in Charge of Construction (OICC) and comply with 41 U.S.C. § 605(a), which requires that claims be submitted to the "contracting officer."

However, after the government's motion to dismiss was filed, the Court of Appeals for the Federal Circuit ruled on the issue of submission of claims to the CO. In *Dawco Construction, Inc. v. United States*, 930 F.2d 872, 879-80 (Fed. Cir. 1991), the Federal Circuit recognized that "Congress deliberately left the language concerning submission [of claims] to the contracting officer broad to permit appropriate Government officers to receive written claims and forward them to the contracting officer," (citing with approval *American Pacific Roofing Co. v. United States*, 21 Cl. Ct. 265, 268 (1990), in which the court found a claim submitted to the OICC to satisfy § 605(a)). The Federal Circuit noted that "the purpose of the [Contract Disputes] Act's 'submit' language is not related to the minutia of addressing or delivering claim letters . . . but is merely a requirement that once a claim is made, the parties must 'commit' the claim to the contracting officer and 'yield' to his authority to make a final decision." *Dawco Constr., Inc.* at 880. It is thus clear to this court that Blake's submission of Steiny's claim to the OICC did not preclude a full hearing of that claim. *See also Neal & Co. v. United States*, 945 F.2d 385 (Fed. Cir. 1991) (affirming that a claim submitted to the contractor's primary government contact rather than directly to the contracting officer satisfies § 605(a)). Accordingly, the government's motion to dismiss for failure to submit a claim properly is denied. Plaintiff's motion for sanctions against the government is also denied as the government

filed its motion to dismiss prior to the Federal Circuit's decision on this issue.

II. Liability

A. The Nature of the Specifications

Notwithstanding the legal arguments proffered, the resolution of this dispute does not require an extensive discussion of the law.[2] Defendant correctly points out that when a contractor agrees to do for a fixed sum a thing possible to be performed, it will not be entitled to additional compensation because difficulties are encountered. *United States v. Spearin*, 248 U.S. 132, 136 (1918). Thus, the critical question facing the court is what the contract required of the contractor, or, more specifically, whether the contract permitted the contractor to construct an underground duct bank. Resolution of this issue will determine whether the Navy's order to stop work on the underground construction and install the conduit overhead constituted a constructive change for which Steiny should be compensated.

Plaintiff urges that the specifications concerning the placement of the electrical conduits are performance specifications which by definition prescribe the desired result but leave the manner by which it is to be achieved

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[2] Defendant argues several canons of contract interpretation, all of which are available to assist the court only if the contract is not clear on its face. Because the court finds that the contract clearly permitted the contractor to perform the work in the manner the contractor attempted, the court need not consider the merits of those arguments.

up to the contractor. Alternatively, plaintiff argues that regardless of the characterization of the specifications, the contract required the electrical contractor to relocate the conduits to avoid interference with other trades, and provided no limitation on the scope of the relocation.

Defendant contends that the specifications in question were design specifications, and that pursuant to the specifications plaintiff was bound to install the electrical conduit above the utility corridor as depicted on the contract drawings. In defendant's view, therefore, it is immaterial whether an underground duct bank would have provided a *better* installation. In regard to plaintiff's alternative argument, defendant argues that the provisions in the specifications and on the drawings instructing the electrical contractor to relocate to avoid conflicting with other trades contained the pictorial limitation that any relocation be within the corridor. Defendant makes this argument even while admitting there were no words of limitation in the specifications or on the drawings. Defendant thus rests its argument on the assertion that plaintiff's interpretation would render certain provisions of the contract meaningless, most particularly the feeder detail drawings, and therefore plaintiff's version of the contract should be disregarded. Defendant maintains that a correct reading of the contract evidences the designer's intention that the electrical conduit be installed overhead.

The Federal Circuit has stated that "[d]esign specifications explicitly state how the contract is to be performed and permit no deviations. Performance specifications, on the other hand, specify the results to be obtained, and leave it to the contractor to determine how

to achieve those results." *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1582 (Fed. Cir. 1987). Thus, the crucial issue before the court is whether the specifications in question "set forth an objective or standard to be achieved," or whether they "set forth in precise detail the . . . manner in which the work was to be performed." *J.L. Simmons Co. v. United States*, 188 Ct. Cl. 684, 412 F.2d 1360, 1362 (1969) (defining performance and design specifications, respectively).

As is often the case, the contract governing this project contained both performance and design specifications, as well as mixed specifications. The specifications directing the electrical subcontractor's performance also contained both design and performance elements. For example, there is no dispute that the specifications and drawings indicating location of the substations were design specifications. The drawings were very specific in describing the locations of the substations relative to one another and relative to the structures in which they were located. The contractor could not have taken it upon itself to move the substations from the west to east side of the building, notwithstanding any contractual provision mandating the avoidance of conflict with other trades. This was the definitive testimony of witnesses from both sides, and is based on the critical nature of the placement of the substations.

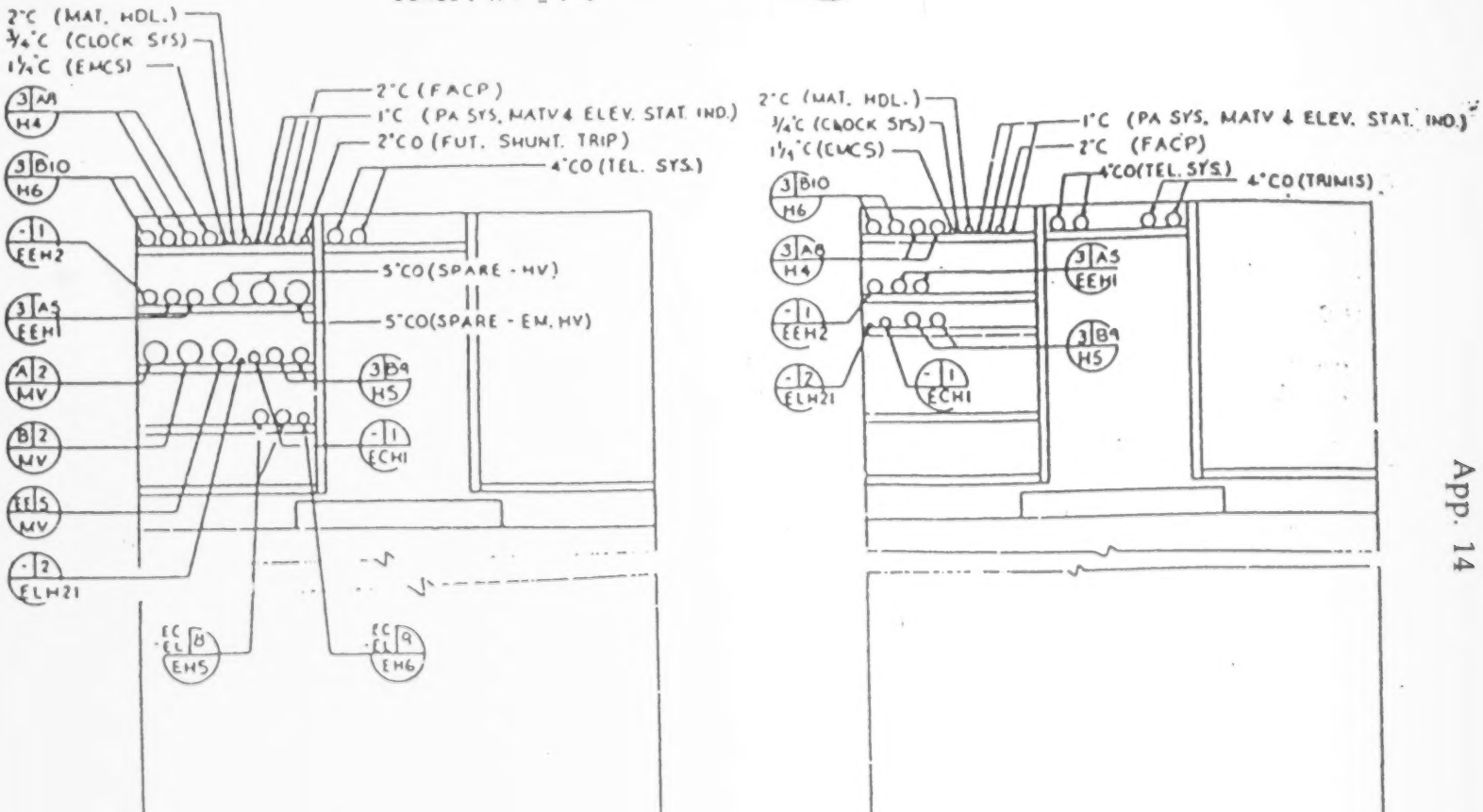
Based upon both parties' experts and the way the drawings were used, it was equally clear that the specifications and drawings for the electrical conduits were performance specifications. Unlike the substations, it is of little consequence where the exact location of the electrical conduits are in an installation such as this hospital

addition. To the extent that there is a preference for either an overhead location or an underground location, the convincing testimony strongly indicated that an underground duct bank would be highly preferable here. It is also preferable according to the best industry practice. Although defendant is correct that the drawings depicted the conduits as suspended from brackets above the corridor, notations on the drawings also indicated that they were "diagrammatic only" and obligated the electrical subcontractor to relocate to coordinate and avoid interference with other trades. The drawings in question are reproduced below:

FEEDER DETAIL

2
EC&EP2.24 E9.47

SCALE : 1/4" = 1'-0"



SECTION D-D

SCALE : 1/2" = 1'-0"

SECTION E-E

SCALE : 1/2" = 1'-0"

Diagrammatic representation of the cross sections of the utility corridor that appeared in the Navy's drawing E4.47, which is plaintiff's exhibit 1.4.

REFERENCE NOTES

1. ALL FEEDER DETAILS & SECTIONS ARE DIAGRAMMATIC. CONTRACTOR SHALL RELOCATE ANY/ALL CONDUITS AS PER EXISTING CONDITIONS TO COORDINATE WITH ALL OTHER TRADES.
2. CONTRACTOR SHALL PROVIDE PULL-BOXES AS REQUIRED FOR PULLING CABLES.

Notes at bottom of E4.47.

The notations on the drawings, similar provisions in the specifications, and the practice of the electrical industry indicate that the method of installation of the electrical feeder systems was governed by performance specifications. At a minimum, it would be inconsistent with the mandate that the electrical subcontractor give way to other trades to construe that the specifications "set forth in precise detail the . . . manner in which the work was to be performed." *J.L. Simmons Co.*, 412 F.2d at 1362. It is thus this court's determination that the specifications at issue are performance specifications.

B. The Placement of the Electrical Feeder System

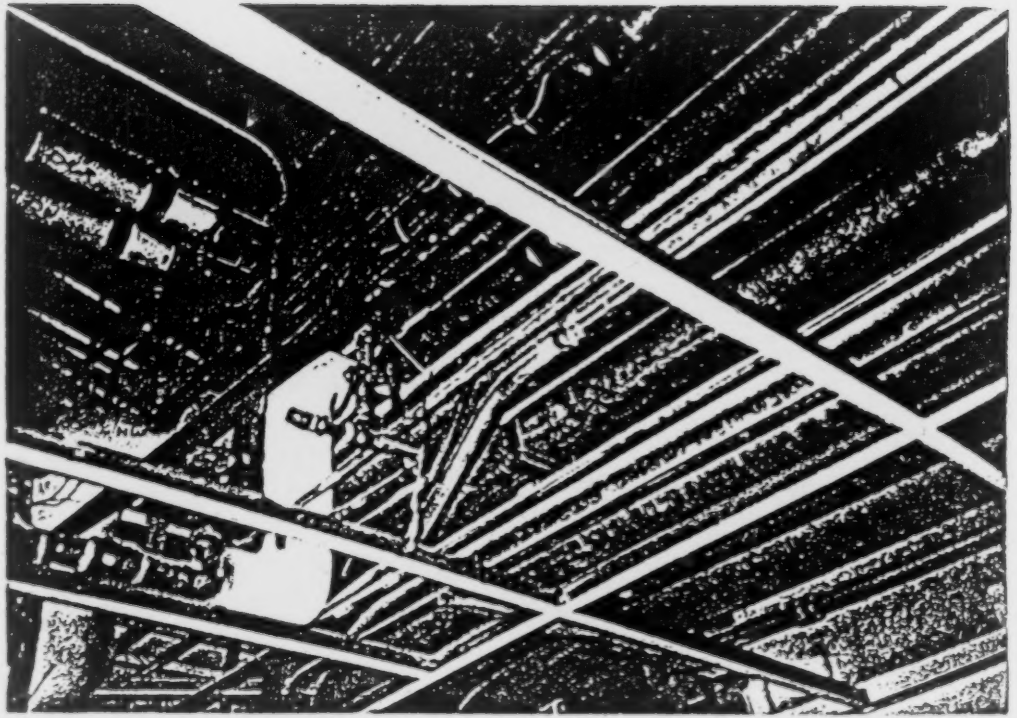
Having determined that the specifications are performance specifications, the court must determine whether plaintiff's decision to place the electrical feeder system in an underground duct bank was based upon a reasonable interpretation of those specifications. If it was, it is compensable. After weighing the evidence, the court finds Steiny's placement decision not only consistent with a reasonable reading of the contract and its requirements, but also the best one that could have been made. In making this determination, the court also finds defendant's insistence that the electrical feeder system be placed overhead contrary to the contract's terms and without a rational basis. No credible reason has been put forth by defendant to buttress its bald assertion that the electrical feeder system should not have been placed underground. Defendant's argument that the specifications were design rather than performance specifications

seems to be based on the misunderstanding that a diagram is also some kind of picture of the final result. The result of this is that the government got an inferior job at a much greater cost! While the court recognizes that the government has the prerogative to contractually require that an objectively unreasonable approach be taken by a contractor, the government does not possess the power to compel a contractor to take such an approach *without compensation* where the contractor never agreed to that bargain.

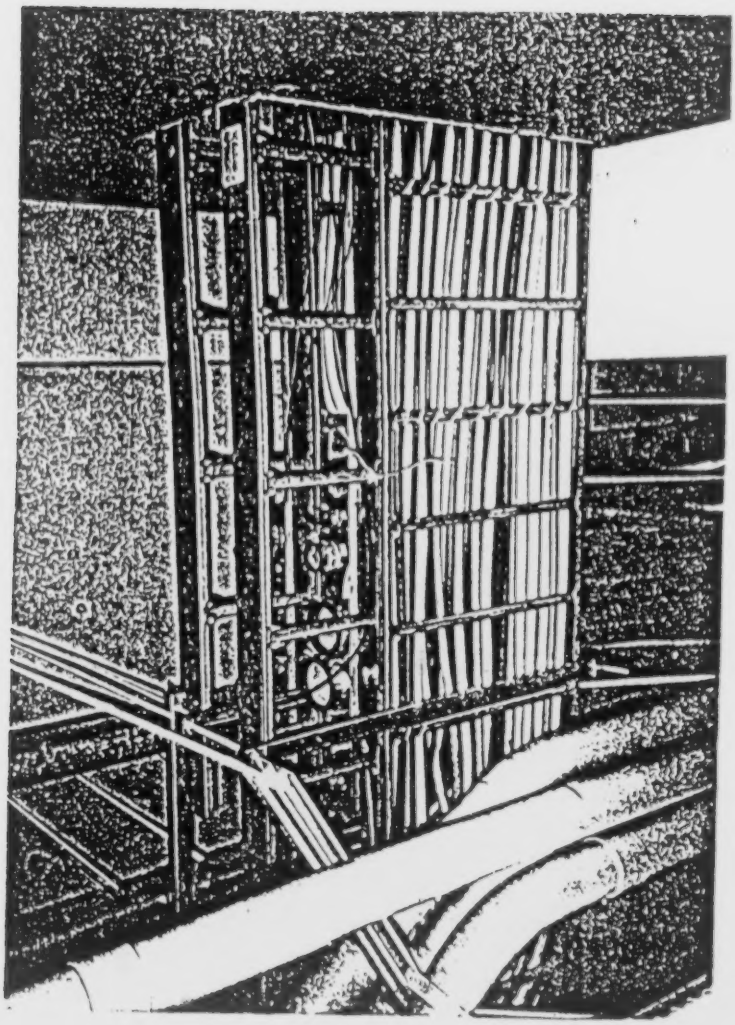
The reasonableness of plaintiff's placement decision and its consistency with the specifications is also borne out by considerations of safety, feasibility, and cost.

1. Safety

From the standpoint of safety, the evidence was convincing that the electrical feeder system posed far less risks placed underground. On its site visit of the hospital, the court observed the morass of wires and conduits which adorned the ceiling of the corridor. A sample of these is shown below.



A section of the utility corridor with ceiling panels removed.



Cable tray with bare cable resting on it.

This presented an unnecessary installation challenge as well as a maintenance problem. In the event of maintenance on the electrical or other utility conduits, it presents a safety hazard. In fact, on its site visit to the warehouse the court observed damage to the high voltage conduits and a large junction box above the corridor, at least in part as the result of forklift use. There was a forklift parked in the area beyond the line marked 'no forklifts beyond this point.' The very kind of activity that could and has caused overhead electrical conduit damage was thus observed. Expert testimony indicated that if the conduit and cable were broken by such a collision serious consequences could occur. Underground conduits would be immune from this problem. The possibility for future damage to the electrical feeder system was also readily apparent from this visit. The conduits which enclosed the electrical system were in many places packed closely to steam and water pipes, which pose significant problems for future maintenance or expansion. It was thus plain that much of the safety concerns created by the corridor placement could have been alleviated by placing as much of the wiring and conduits as possible underground.

2. *Feasibility*

It is also clear to the court that practical considerations dictated the placement of the electrical feeder system underground. As the parties acknowledge, the feeder system was extremely complicated, consisting of hundreds of wires and other electrical materials. As such, the feeder system created a crowding problem when placed overhead. The evidence again showed that it was not

only wise to put the system in an underground duct bank below the corridor surface, safe from harm's way, it was also the only feasible solution available to Steiny given the spatial constraints of the corridor. It was also clear on the court's visit that there was major interference between the electrical feeder system and the other trade materials in the hospital corridor. In this respect, too, practical considerations dictated the placement of the system in an underground duct. According to the defendant's own representation, accessibility to the system for maintenance and repair was an important concern of the Navy. However, Mr. McClure testified and the evidence indicates that the feeder system would have been more accessible had it been placed in an underground duct.

3. Cost

Finally, in terms of cost, plaintiff's placement decision was superior. In regard to the initial installation of the feeder system, the evidence illustrates a considerable cost difference between utilizing overhead brackets and an underground duct. The physical layout of the hospital corridor required routing the conduits around other trade materials. By contrast, placing the feeder system underground presented a far more cost effective alternative of simply digging a trench and placing the system in it. The only concern in placing an electrical system underground involved potential interference with the foundation, a concern the evidence indicated, was no present here.

The cost differential between the two methods of installation over the course of time also militated against a rational decision requiring the feeder system overhead. Once the electrical system is put in place, maintenance

costs are continuously incurred. The evidence showed that the underground duct would have provided easier, and therefore more cost-effective, access to the conduits. Repair and maintenance of the conduits in their present bracket positions involves potential interference with and possible damage to the other systems and conduits. It also involves potential interference with people and materials moving through the corridor. Additionally, it increases the very likelihood of any maintenance.

III. Damages

At trial, plaintiff offered very convincing evidence in regard to the damages it is entitled to as a result of the Navy's constructive change. Supplemented by the credible testimony of Mr. Don McClure, plaintiff presented an itemization of the costs incurred as a result of requiring the conduit to be placed overhead rather than underground. The costs were broken down as follows:

Direct costs	$854,125.00[3]
Field Overhead	187,908.00
Steiny divisional overhead	92,845.00
Steiny profit (20%)	226,976.00
Steiny bond	8,035.00
Blake overhead	198,634.00
Blake profit (6%)	94,111.00
Blake bond	16,626.00
Total Costs	$1,679,260.00

[3] This figure represents the revised amount of direct costs claimed by plaintiff, as corrected at trial. *See McClure* testimony, January 26, 1990, transcript pages 823-42. The damage figures which follow the direct cost figure are calculated according to the methodology set forth in plaintiff's exhibit 64.1.

The government attempted to counter plaintiff's damage claims with the testimony of Mr. Ray Caswell. Mr. Caswell challenged the validity of the direct cost figures upon which plaintiff based its calculations. Specifically, Mr. Caswell questioned plaintiff's proposed estimate for the unit cost of a representative cross section of the duct bank. The estimate figure represented the total cost of one lineal foot of the duct pipes or conduits, a figure which when multiplied by the length of the corridor would produce a direct cost estimate. The duct bank consisted of various conduit sizes, *e.g.* one four-inch, two three-inch, five two and one-half inch, *etc.* Thus, within a given cross section of the duct bank, there were different numbers of various conduit sizes. Upon close examination by the court, it became obvious that Mr. Caswell had no basis for calling into question plaintiff's damage calculations.[4]

---

[4] The court offers the following exchange between the court and Mr. Casell as representative of the government's challenge to plaintiff's damage figures:

> THE COURT: How do you factor in the fact that that's not a representative sample? How do you increase $16.83 to what, in fact, it would be if you had 3 at one-inch, 4 at four-inch, 2 at two-inch, etc. Where is that calculation done?
>
> MR. CASWELL: Well, I didn't quite understand what you are saying, Your Honor, about the $16.83.
>
> THE COURT: Well, the $16.83 represents only one of each category of pipe, only one lineal foot of each category of pipe.
>
> MR. CASWELL: Yes.
>
> THE COURT: But in the real world, assuming your count as opposed to – there's been some dispute on that issue – but assuming your count, that there are 4

CONCLUSION

As a result of Captain O'Donnell's change to the contract, Steiny is entitled to a contract adjustment in the

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four-inches, and 3 one-inches, and 2 two-inches, how do you come to that fact? What figure increases the $16.83 which should only represent one of each type per foot?

MR. CASWELL: If you'll note in the column where it says prime there, the total of all of those unit measurements, that $1.04, $7.75, $2.00, and $6.00, and so on, you total that all up and it's $12.93 [sic] for that one cross section.

THE COURT: Right. Of one each. That's only assuming, not the real cross section, it's only one of each pipe because it's only got 1 one-inch, instead of 3. Its only got – that I can see.

MR. CASWELL: So, if you took 985 feet times that number, you should have a cross section of that total cost.

THE COURT: But you still have – you've only got accounted – because we're going through this step by step, you've only accounted for one of the one-inch instead of three of the one-inch. The $1.04, we agreed, was the labor and the material cost for 1 one-inch section. If it was to be really representative of the real cross section, it should be – that one should be $3.12. Shouldn't it?

MR. CASWELL: Yes, I see what you are saying, and that would be correct.

THE COURT: So, that would mean, in fact, the $16.83 would be substantially larger.

MR. CASWELL: The $16.83 represents the sum total of all of the markups on that one line of one foot.

THE COURT: Right. But, that's a non-representative line. It would be, I guess, to have the analogy, if we were going to try to determine, to give a different

amount of One Million Six Hundred Seventy Nine Thousand, Two Hundred Sixty Dollars ($1,679,260.00), together with interest thereon from October 12, 1984. Interest is to be computed according to the Contracts Disputes Act, 41 U.S.C. § 611 (1988). The clerk is directed to enter judgment accordingly. Plaintiff will have sixty days from the issuance of this opinion to file, if it so elects, an application for attorney fees and expenses under the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(1)(B) (Supp. 1991).

> value to each color of clothing, we would have, say, one blue jacket here and we have one tan jacket and we have one green person. That, obviously, wouldn't be a real reflection of anything other than just a listing of the different colors we have available. If you wanted to have an actual portion of how many blue coats and how many tan coats, we'd have to count everyone in the universe.
>
> MR. CASWELL: What I do, Your Honor, is when I get these numbers, I check them with other data on a cross section duct bank.
>
> THE COURT: Yes.
>
> MR. CASWELL: And get the cost, the general cost from history, from what it costs to run one foot of that. At the time that I had this number there, I was pretty satisfied that it was indicative of that bank because of other source material.
>
> THE COURT: But even by your own figures on the left side, it isn't indicative of the mix, because the mix is not even proportionately of 3 one-inch, 4 four-inch, 2 two-inch, where your $16.83 seems to say you have one of each.
>
> MR. CASWELL: That's what it seems to be indicating.

Caswell testimony, January 26, 1990, transcript pages 910-12.

IT IS SO ORDERED.

/s/ Loren A. Smith
LOREN A. SMITH
Chief Judge

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 10th day of JUNE 1992, I caused to be placed in the United States mail (first-class mail, postage paid) copies of "BRIEF FOR DEFENDANT/APPELLANT" addressed as follows:

R. D. Corona, Esq.
CORONA, BALISTRERI &
RAMSEYER
1551 Fourth Ave. 8th Floor
San Diego, CA 92101

/s/ Lori A. Shuford

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-5092

BLAKE CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

DECIDED: February 23, 1993

Before NIES, *Chief Judge*, RICH and MAYER, *Circuit Judges*.

MAYER, *Circuit Judge*.

The United States appeals the judgment of the United States Court of Federal Claims,* 25 Cl. Ct. 177 (1992), awarding an equitable adjustment to Blake Construction Company, on behalf of its subcontractor Steiny and Company, Inc., for additional costs incurred under its contract with the Department of the Navy. We reverse.

Background

Blake Construction Company contracted with the Department of the Navy to construct replacement medical facilities at the San Diego Naval Regional Medical

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* The United States Claims Court was renamed the Court of Federal Claims on October 29, 1992. Federal Courts Administration Act of 1992, Pub. L. No. 102-527, § 902(a), 106 Stat. 4506 (1992).

Center. The contract called for the construction of four new structures, including a mechanical equipment building, a warehouse, an auxiliary building, and a nursing tower. A corridor of approximately 1,000 feet ran most of the length of the ground floors of the buildings and was designed to enable people, supplies and utilities to move between the buildings. It is the manner in which the contract required electrical conduits to be installed along this corridor as part of an electrical feeder system that gives rise to the controversy before us.

Specifications governing the installation of the electrical feeder system were prepared by a joint venture architect and engineering firm and were made available to bidders. Power coming into the hospital from outside high voltage lines was to be reduced to a variety of lower voltages by transformer units and then distributed throughout the buildings via a branching series of ever smaller lines conveyed by electrical conduits. The series of drawings pertaining to the installation of the electrical conduits within and between the buildings depicted the conduits as installed overhead along the west side of the corridor, hanging either exposed from utility racks, or hidden from view by a dropped ceiling. These drawings also included notes describing the drawings as "diagrammatic." On some drawings the notes stated: "All feeder details & sections are diagrammatic. Contractor shall relocate any/all conduits as per existing conditions to coordinate with all other trades." On other drawings, the notes similarly stated: "All feeder locations are diagrammatic. Contractor shall relocate feeders as per existing conditions and shall coordinate with other trades."

After Blake was awarded the contract, and before any construction of the buildings had commenced, its electrical subcontractor Steiny and Company, Inc. began installation of the electrical feeder system in an underground concrete duct bank along the planned path of the corridor. When the Navy challenged this installation method, Steiny asserted that the contract's "diagrammatic" notes permitted the contractor to relocate the electrical conduits so as to avoid conflict with other trades, such as mechanical and plumbing, which were to be installed in the corridor. The Navy issued a stop work order informing Blake that the underground duct bank did not comply with the contract specifications, and directed that the conduits be installed overhead within the corridor as depicted in the drawings. Blake notified the Navy that it considered this directive to be a constructive change to the contract for which it was entitled to more money. When the Navy reissued its directive, Steiny removed the underground bank under protest.

After the corridor was constructed and ready to receive utilities, a conflict arose between Steiny and the mechanical subcontractor over the location of their respective trades. To alleviate the interference, Steiny agreed to move to the east side of the corridor. In one thirty foot section, the electrical conduits had to be placed outside the corridor, and in another they were located outside the planned route of the feeders. Both changes were approved by the Navy. In addition, Steiny generally had to weave the conduits between and around the other utilities in the corridor.

Blake submitted a claim on behalf of Steiny for an equitable adjustment to cover the costs of relocating the

underground duct bank to the overhead placement. The contracting officer denied Blake's claim and this action in the Claims Court followed. After a trial, the Claims Court held that Blake was entitled to recover $1,679,260 plus interest, representing the cost incurred pursuant to the Navy's directive to install the conduits overhead in the congested corridor. The government appeals.

Discussion

The central question in this case is whether the contract gave Blake discretion to choose an underground location for installing the electrical feeder system. The point of disagreement is the meaning of the notes indicating that the drawings were "diagrammatic" and requiring the contractor to relocate in order to coordinate with other trades. The word "diagrammatic" is not defined by the contract.

Blake urges that resolution of this case turns on the characterization of the specifications as either "design" or "performance." The difference between performance specifications and design specifications is well established. Performance specifications "set forth an objective or standard to be achieved, and the successful bidder is expected to exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection." *J.L. Simmons Co. v. United States*, 412 F.2d 1360, 1362 (Ct. Cl. 1969). Design specifications, on the other hand, describe in precise detail the materials to be employed and the manner in which the work is to be performed. The contractor has no discretion to deviate from the

specifications, but is "required to follow them as one *would a road map.*" *Id.* "Detailed design specifications contain an implied warranty that if they are followed, an acceptable result will be produced." *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1582 (Fed. Cir. 1987) (citing *United States v. Spearin*, 248 U.S. 132 (1918)).

Blake argues that the specifications in question are performance specifications which describe one objective – that the electrical feeder system be installed in a manner which avoids conflict with the other trades. It offers these arguments in support of its contention. First, because the diagrammatic notes explicitly required Blake to avoid interference with the other trades, without detailing the exact manner in which this was to be accomplished, the contract gave Blake the discretion to employ the means it deemed best to achieve this goal, including underground installation. Second, because the electrical feeder system could not be installed exactly as depicted by the Navy's drawings, and some alterations were necessary to avoid conflict with other trades, the specifications must by definition be "performance" because they did not provide the "road map" characteristically associated with a design specification. Because the specifications are "performance," and because an underground installation was the best way to avoid conflict with other trades in the corridor, Blake concludes that the. Navy's directive ordering it to install the conduits overhead constituted a constructive change in the contract.

This reasoning obscures the real question in the case. Taking the second argument first, the mere fact that a specification cannot be followed precisely does not, in and of itself, indicate that it is "performance" and not

"design." Were this true, any specification intended to be a design specification would be transformed into a performance specification if it were faulty. This is nonsensical; common sense dictates that the contractor does not acquire unfettered discretion to complete the contract in any manner it sees fit, just because one aspect of the specification might be defective. *See J.L. Simmons,* 412 F.2d 1360 (contractor brought flaws in design specifications to government's attention, proceeded under government's direction, and was entitled to equitable adjustment); *S.W. Elecs. & Mfg. Corp. v. United States,* 655 F.2d 1078, 1081 (Ct. Cl. 1981) (same). 'The fact that the electrical conduits could not be installed overhead in the precise manner depicted by the drawings, and at some points had to be installed outside the corridor itself, did not automatically relieve Blake of the obligation to install them overhead.

More generally, the problem with both of Blake's arguments is that the distinction between design and performance specifications is not absolute, and does not dictate the resolution of this case. Contracts may have both design and performance characteristics. *See, e.g., Utility Contractors, Inc. v. United States,* 8 Cl. Ct. 42, 50 n.7 (1985) ("Certainly one can find numerous government contracts exhibiting both performance and design specifications."), *aff'd mem.,* 790 F.2d 90 (Fed. Cir. 1986); *Aleutain Constructors v. United States,* 24 Cl. Ct. 372, 379 (1991) ("Government contracts not uncommonly contain both design and performance specifications."). It is not only possible, but likely that a contractor will be granted at least limited discretion to find the best way to achieve goals within the design parameters set by a contract. *See,*

e.g., Penguin Indus., Inc. v. United States, 530 F.2d 934, 937 (Ct. Cl. 1976). "On occasion the labels 'design specification' and 'performance specification' have been used to connote the degree to which the government has prescribed certain details of performance on which the contractor could rely. However, those labels do not independently create, limit, or remove a contractor's obligations." *Zinger Constr. Co. v. United States*, 807 F.2d 979, 981 (Fed. Cir. 1986) (citations omitted). These labels merely help the court discuss the discretionary elements of a contract. It is the obligations imposed by the specification which determine the extent to which it is "performance" or "design," not the other way around.

The real issue is not whether the drawings and diagrammatic notes in their entirety should be labeled design specifications or performance specifications, but how much discretion the specifications gave Blake in the placement of the electrical feeder system. This is a question of contract interpretation which is a matter of law for this court to decide. *R.B. Wright Constr. Co. v. United States*, 919 F.2d 1569, 1571 (Fed. Cir. 1990). Although the trial court's opinion may be helpful, we are not bound by it. *J.B. Williams, Co. v. United States*, 450 F.2d 1379, 1388 (Ct. Cl. 1971). There is no question that the diagrammatic notes gave the electrical contractor some discretion to work around the other trades, but we think the Claims Court defined too broadly the amount of discretion permitted under the contract.

"Contracts are viewed in their entirety and given the meaning imputed to a 'reasonably intelligent contractor' acquainted with the involved circumstances, regardless of whether labelled 'design,' 'performance,' or both." *Zinger*

Constr., 807 F.2d at 981 (citing *J.B. Williams*, 450 F.2d at 1388). We believe that a reasonable contractor would understand that the contract required more than mere avoidance of conflict with the other trades. the specifications, viewed as a whole, additionally required installation of the conduits overhead within the confines of the corridor. This is the only conclusion that gives meaning to the drawings. An interpretation which gives reasonable meaning to all parts of a contract is preferred to one which renders part of it insignificant or useless. *Hills Materials Co. v. Rice*, 982 F.2d 514, ___, 1992 WL 385496, at *2 (Fed. Cir. 1992). All the drawings depicted overhead installation of the electrical conduits and, more specifically, showed either an exposed or concealed installation depending on their position along the length of the corridor. An interpretation permitting underground installation renders these drawings meaningless. Accordingly, the government's interpretation of the specifications is the only reasonable one.

Contrary to Blake, we do not revisit the Claims Court's fact findings to reach our conclusion. The Claims Court thought the specifications were "performance" for several nondispositive reasons – first, the diagrammatic notes indicated the drawings need not be followed exactly; second, the evidence showed an underground installation was better than an overhead installation; and third, industry practice favored underground installation. As we have observed, the meaning of the diagrammatic notes is a matter of law. Because we conclude the contract did not permit Blake to install the electrical conduits underground, whether or not this method would have been "better" is irrelevant. Finally, whether local trade

custom was to install electrical conduits underground is also irrelevant here. Contracting parties may freely choose to have work performed in a specified manner; here, the government opted to install the electrical conduits overhead, even if this was not the usual mode.

Conclusion

Accordingly, the judgment of the Court of Federal Claims is reversed.

REVERSED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-5092

BLAKE CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

ORDER

(Filed April 13, 1993)

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on April 20, 1993.

FOR THE COURT
FRANCIS X. GINDHART,
CLERK

Dated: April 13, 1993

By /s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

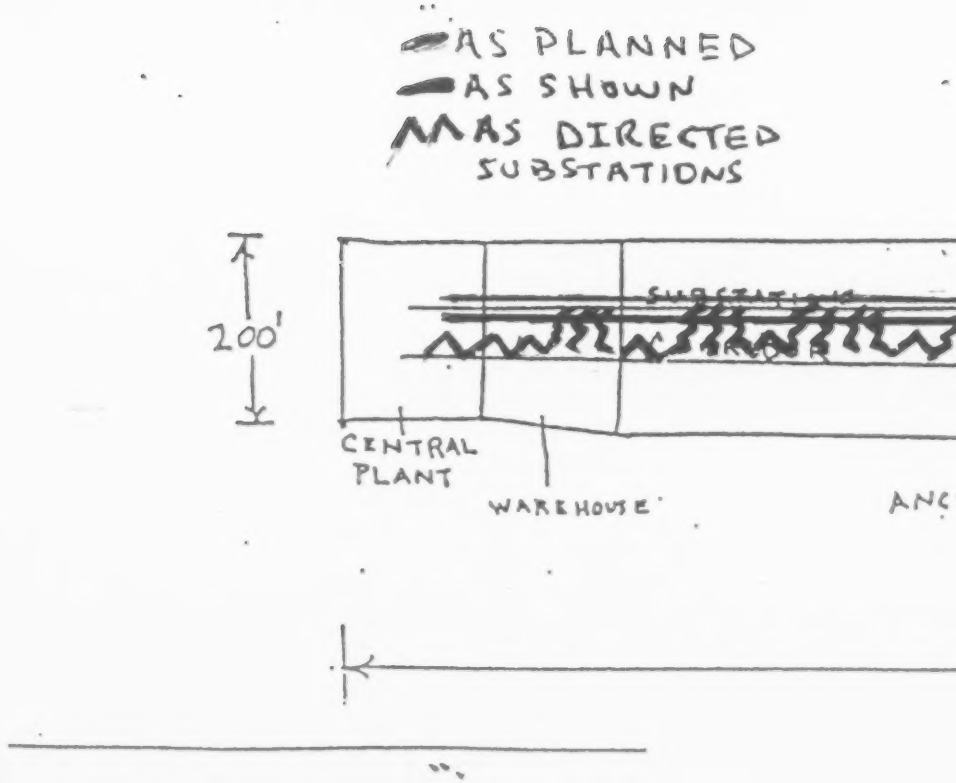
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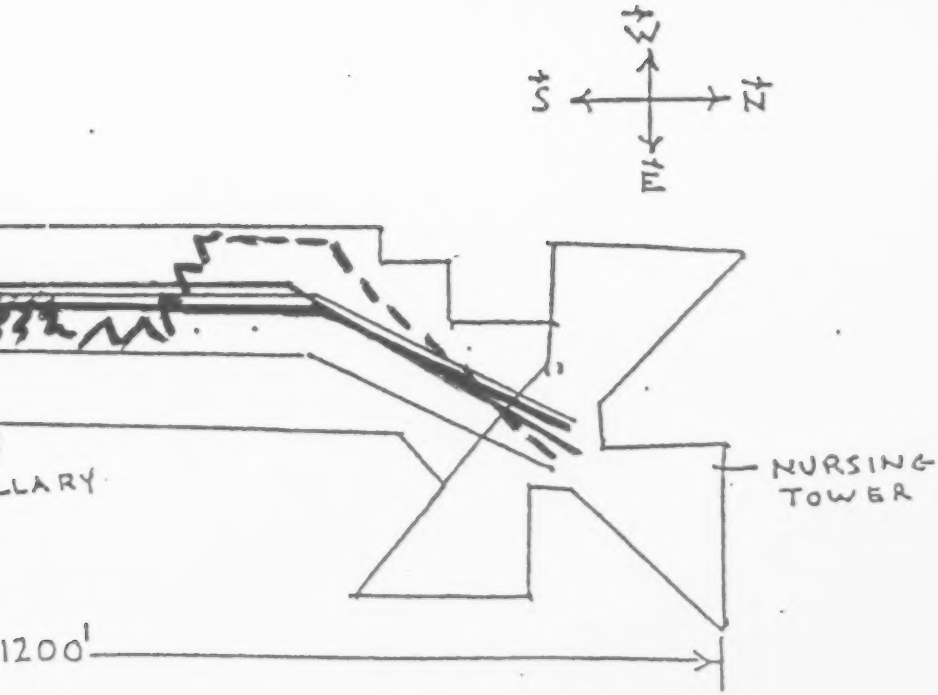
BLAKE CONSTR V. US, 92-5092
(CLM - 556-85C)

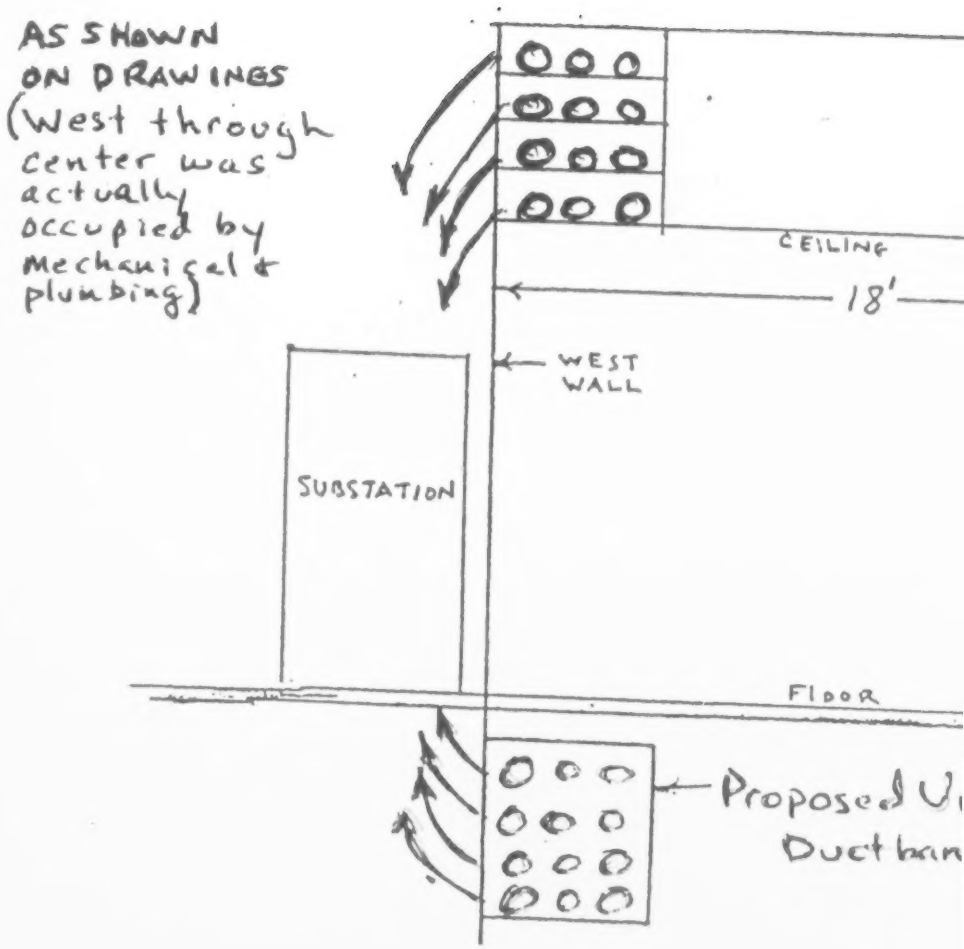
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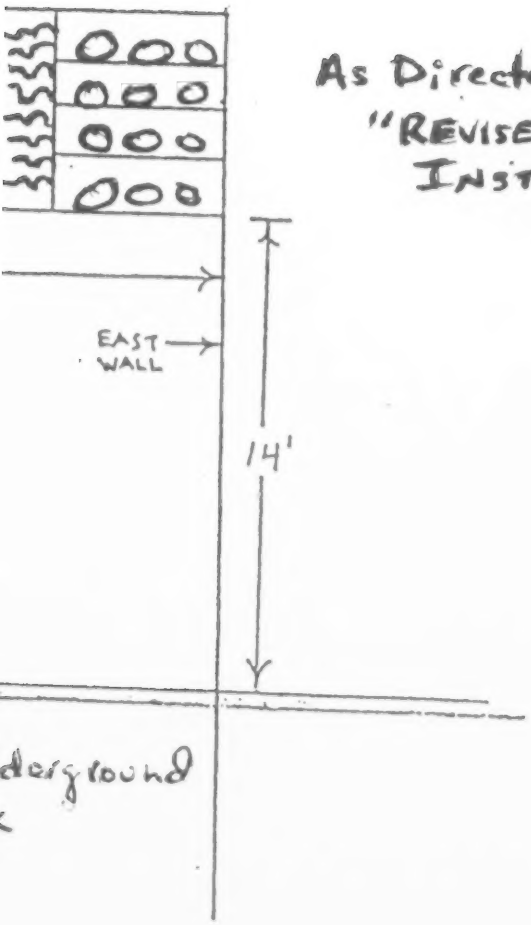
* Note: Pursuant to Fed. Cir. R. 47.8, this order is *
* not citable as precedent. It is a public record. *
* *

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AS PLANNED
AS SHOWN
AS DIRECTED
SUBSTATIONS
200'
CENTRAL PLANT
WAREHOUSE


W
S
N
E
NURSING
TOWER
1200'


AS SHOWN
ON DRAWINGS
(West through
center was
actually
occupied by
mechanical &
plumbing)
CEILING
18'
WEST
WALL
SUBSTATION
FLOOR
Proposed U
Duct bank



As Directed
"REVISED
INSTALLATION"

(2)

Supreme Court, U.S.
FILED
OCT 15 1993
OFFICE OF THE CLERK

No. 93-90

In the Supreme Court of the United States

OCTOBER TERM, 1993

BLAKE CONSTRUCTION COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the specific terms of petitioner's contract with the government did not call into play the warranty recognized by this Court in *United States* v. *Spearin*, 248 U.S. 132 (1918).

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-90

BLAKE CONSTRUCTION COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26-34) is reported at 987 F.2d 743. The opinion of the United States Claims Court, now the Court of Federal Claims (Pet. App. 1-25), is reported at 25 Cl. Ct. 177.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1993. A petition for rehearing was denied on April 13, 1993. Pet. App. 35-36. The petition for a writ of certiorari was filed on July 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner and the United States Department of the Navy entered into a $98.4 million fixed-price contract to build medical facilities at the San Diego Naval Regional Medical Center. Pet. App. 1-2, 26-27. The contract provided for the construction of four buildings connected by a corridor measuring approximately 14 feet high, 18 feet wide, and 1,000 feet long, designed to move people, supplies, and utilities (heat, water, and electricity) within the buildings. *Id.* at 3-4, 27. Petitioner entered into a $10.2 million subcontract with Steiny and Company, Inc. (Steiny) for all electrical work on the project. *Id.* at 2.

The electrical work on the project included the installation of an electrical feeder system, by which electricity entered the facility via high-voltage lines, was reduced to lower voltages by transformers, and was distributed throughout the buildings by a network of increasingly smaller lines conveyed by electrical conduits. Pet. App. 2-3, 27. The contract drawings depicting the electrical feeder system showed the necessary conduits overhead along the west side of the corridor, suspended from utility racks, either exposed or hidden from view by a dropped ceiling. *Id.* at 14, 27. These drawings included notes which advised that the illustrations were "diagrammatic," *i.e*, not scaled to an exact location, and the notes on some drawings stated, "Contractor shall relocate any/all conduits as per existing conditions to coordinate with all other trades." *Ibid.*

Before construction of the corridor commenced, Steiny dug a trench along the planned path of the corridor and began installing the electrical feeder system in an underground concrete duct bank. Pet. App. 4, 28. The Navy issued a stop work order advising petitioner that the underground electrical system did not conform to

contract requirements as shown in the drawings. *Id.* at 4-5, 28. The Navy directed that the underground system be removed. *Id.* at 4-5. Petitioner advised the Navy that it considered this directive to be a constructive change in the contract for which it was entitled to additional compensation. *Id.* at 5. The Navy refused to change its position, and Steiny removed the underground duct bank under protest. *Ibid.*

Subsequently, a conflict over space in the overhead area developed with the mechanical subcontractor. After advising the Navy of the problem, petitioner directed Steiny to install the electrical conduits along the east side of the corridor's ceiling, rather than the west side as shown in the drawings, and the mechanical subcontractor installed plumbing along the west side. Pet. App. 5-6. In two locations, the electrical conduits were placed outside the corridor, and in other places it was necessary to weave them around mechanical conduits or pipes. *Id.* at 6.

Petitioner later submitted a claim under the Contract Disputes Act of 1978, 41 U.S.C. 601-613 (1988 & Supp. III 1991), for $1,136,089, which it claimed as the additional costs for relocating the electrical system from underground to overhead. Pet. App. 6-7, 28-29. The Navy denied this claim, and petitioner filed this action in the Claims Court. *Id.* at 29.

2. The Claims Court held that petitioner was entitled to an equitable adjustment of $1,679,260, plus interest. Pet. App. 1-25. That court concluded that the contract permitted the contractor to place the electrical feeder conduit in an underground duct bank, and that the Navy's order to relocate it overhead was an arbitrary constructive change in the contract. *Id.* at 8, 10-16. In the court's view, the drawings showing the system located overhead were "performance specifications" that set forth an objective or standard to be achieved but which left the

manner for achieving that result to the contractor. *Id.* at 10-13. The court rejected the government's position that the contract contained "design specifications" for the electrical feeder system that prescribed the precise manner in which the work was to be performed. *Ibid.* The court found that Steiny's proposed underground system was not only reasonable, but, in fact, superior to an overhead system in terms of safety, feasibility, and cost. *Id.* at 15-21. The court therefore awarded petitioner its additional costs for relocating the system. *Id.* at 21-24.

3. The court of appeals reversed. The court noted that the "central question in this case is whether the contract gave [petitioner] discretion to choose an underground location for installing the electrical feeder system," Pet. App. 29, an issue of contract interpretation that the court reviewed *de novo*. *Id.* at 32. In the court's view, the decisive issue was not whether the dispute should be characterized as involving "performance" or "design" specifications, but whether the contract should be interpreted to give petitioner unfettered authority to install the electrical feeder system underground, rather than doing so overhead. *Id.* at 30-32. While the notes to the contract drawings provided petitioner some discretion to avoid conflicts with other trades, the court held that "[a]ll the drawings depicted overhead installation of the electrical conduits," and "[a]n interpretation permitting underground installation renders these drawings meaningless." *Id.* at 32-33. The court of appeals accordingly concluded that petitioner was not entitled to additional compensation for relocating the conduits overhead. *Id.* at 34.

ARGUMENT

1. Petitioner first contends (Pet. 17-25) that the court of appeals' decision conflicts with *United States* v.

Spearin, 248 U.S. 132 (1918), which held that the government impliedly warrants the adequacy of its contract specifications. That claim does not warrant further review.

The essence of petitioner's claim (Pet. 20-22) is that it is entitled to compensation for the costs incurred in relocating the conduits from the west wall to the east wall, because the contract drawings that showed the electrical conduits along the west wall required an impossible task in that they depicted the conduits as fitting entirely within the corridor (where they would interfere with other utilities). The defect in that argument is that the claim advanced by petitioner below addressed a different matter. Petitioner sought (Pet. App. 5, 6-7, 28-29) and the Claims Court awarded (*id.* at 8, 21-22, 29) damages for the increased costs of moving the feeder system from the underground trench to an overhead location. Petitioner never filed an administrative claim seeking an equitable price adjustment based on any additional expenses it may have incurred in moving the system from the west wall to the east wall of the corridor, well after the Navy ordered petitioner to comply with the original drawings showing that the feeder system should not be placed underground. Absent such a claim, the courts below lacked jurisdiction under 41 U.S.C. 609 to consider any such damages. *Dawco Constr., Inc.* v. *United States*, 930 F.2d 872, 877 (Fed. Cir. 1991).

2. To the extent that petitioner continues to press its claim for the costs it incurred in connection with its initial decision to place the conduits in an underground trench, the court of appeals correctly concluded that the fact that the original drawings could not be followed in every detail did not relieve petitioner of the obligation to install the conduits overhead. Pet. App. 30-31. As the court explained, "common sense dictates that the contractor does not acquire unfettered discretion to com-

plete the contract in any manner it sees fit, just because one aspect of the specification might be defective." *Id.* at 31. Instead, under established precedents, petitioner's remedy was to bring the flaws in the specifications to the government's attention, proceed under its direction, and then seek an equitable price adjustment. See *S.W. Electronics & Mfg. Corp.* v. *United States*, 655 F.2d 1078 (Ct. Cl. 1981); *J.L. Simmons Co.* v. *United States*, 412 F.2d 1360 (Ct. Cl. 1969). Petitioner's unilateral decision to place the feeder conduits underground at the outset did not satisfy those requirements.

3. There is no merit to petitioner's related contention that the court of appeals improperly reversed the Claims Court's factual finding that performance was impossible without determining that that finding was clearly erroneous. Pet. 28. The court of appeals made clear that it did "not revisit the Claims Court's factual findings to reach [its] conclusion." Pet. App. 33. The court merely held that the Claims Court committed a legal error when it interpreted the contract's provision granting petitioner limited discretion to accommodate conflicts with other trades as encompassing the authority to relocate the feeder system from an overhead location to an underground duct—an interpretation that, as the court of appeals correctly noted (*ibid.*), would have rendered meaningless other provisions of the contract. The court of appeals' treatment of that issue is consistent with the well settled principle that the interpretation of a contract generally is a question of law. *Beta Systems, Inc.* v. *United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988); 3 A. Corbin, *Corbin on Contracts* § 554 (1960); 4 S. Williston, *A Treatise on the Law of Contracts* § 616 (3d ed. 1961). The court of appeals' application of that principle to this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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